
OPINION OF THE PUBLIC ACCESS COUNSELOR

NEWTON COUNTY BD. OF COMM'RS,
Complainant,

v.

THE NEWTON COUNTY COUNCIL,
Respondent.

Formal Complaint No.
18-FC-130

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Newton County Council violated the Open Door Law.¹ Attorney James R. Reed filed an answer to the complaint on behalf of the Council. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 5, 2018.

¹ Ind. Code §§ 5-14-1.5-1 to -8

BACKGROUND

This case involves an intra-agency dispute between the Newton County Board of Commissioners (“Board”) and the Newton County Council (“Council”).

The Newton County Council – the fiscal body of the county – holds regularly scheduled meetings on the third Monday of each month.

The Council held a budget hearing on August 22, 2018. This hearing was recessed several times and finally adjourned on September 21.

On September 6, 2018, the Council held an executive session for the purpose of discussion of job performance of a county employee. This meeting was allegedly not noticed at the proper meeting location.

As a result, on October 5, 2018, the Board filed a formal complaint with this Office alleging the Council violated the ODL in the following three ways: (1) By conducting an executive session during a meeting in violation of Indiana Code Section 5-14-1.5-6.1(e); (2) By holding an executive session for an improper purpose; and (3) By failing to post notice of the executive session at least forty-eight hours prior to the meeting.

The Council denies the substantive allegation that the executive session was improper but partially concedes that an ODL violation may have occurred in connection to the executive session notice.

ANALYSIS

At issue in this case is whether the Newton County Council violated the Open Door Law, as alleged by the Newton County Board of Commissioners, by: (1) Conducting an executive session during a meeting with the intent of circumventing the law; (2) Holding an executive session for an improper purpose; and (3) Failing to post a copy of the notice of its executive session at least forty-eight hours before the meeting.

1. The Open Door Law

The public policy of the Open Door Law (“ODL”) is that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* Ind. Code § 5-14-1.5-1.

Therefore—unless an exception applies—all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* Ind. Code § 5-14-1.5-3(a).

Under the ODL, public notice must be given 48 hours in advance by the governing body of a public agency as follows: The governing body of a public agency shall give public notice by posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held. Ind. Code § 5-14-1.5-5(b)(1).

The Newton County Council (“Council”) is a public agency for purposes of the ODL; and thus, subject to the law’s requirements. That means, unless an exception applies, all

meetings of the Council must be open at all times to allow members of the public to observe and record.

2. Executive Sessions

The crux of the Board's complaint is the Council's executive session on September 6, 2018.

2.1 Defining Executive Session

Under the ODL, an executive session is a meeting where the governing body of a public agency may—in statutorily limited circumstances—exclude the public from a meeting, except the governing body may admit those persons necessary to carry out its purpose. Ind. Code § 5-14-1.5-2(f); *See also* Ind. Code §§ 5-14-1.5-6.1(b)(1), to -(14)(providing the specific instances where an executive session is permissible).

2.2 Notice Requirements

Notice requirements for an executive session are similar to a regular meeting save for additional requirement that the subject matter of the session must be stated in the notice.² In other words, a closed meeting may only occur under the specific instances set out in subsection 6.1 of the ODL.

The public notice must also be posted at the principal office of the governing body pursuant to Indiana Code section 5-14-1.5-5(b)(1) at least 48 hours before the session.

Here, the Council concedes that the notice was not posted outside the Council meeting room, nor was it posted anywhere 48 hours in advance as the Auditor served written notice the morning of the executive session.

² Ind. Code § 5-14-1.5-6.1(d).

Therefore, a violation of the Open Door Law occurred as the notice of the executive session was defective.

2.3 Subject Matter of the Executive Session

The Commissioners also take exception to the Council's calling of the executive session to address the job performance a county employee.

Indiana Code section 5-14-1.5-6.1(b)(9) provides that an executive session may be held to: "discuss a job performance evaluation of individual employees. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process."

The statutory authority of county councils and commissioners are fairly delineated in the Indiana Code. County council who are the county fiscal bodies are limited to duties enumerated in Indiana Code section 36-3-2-7 to address budgets and tax rates. Personnel performance evaluations by a county council is not a duty contemplated by Indiana Code and is instead given to county Board of Commissioners.

Read in harmony with the entirety of the statute, it appears as if the intent of the legislature was to limit the ability of a governing body to hold executive sessions only for matters over which they have jurisdiction or a vested interest. For example, subsection 6.1(b)(6) explicitly and only applies to receiving information about an individual over whom the governing body has jurisdiction.

Nonetheless, an argument could be made that (b)(9) is not expressly prohibited. However, it does not appear as if the meeting was held to discuss performance evaluations at all, but rather alleged misconduct – a consideration made clear in the Council's response. Scrutinizing misconduct of county

employees is simply not the Council's job, but the Commissioners.'

Since fiscal bodies do not oversee county employees, an executive session was improper. Arguably, there are few instances, if any, where a county council can hold an executive session if they only serve as the fiscal body.

2.4 Executive Session within a Meeting

Finally, the Commissioners argue the act of holding an executive session within a meeting is inherently a violation of the Open Door Law.

Indiana Code section 5-14-1.5-6.1(e) states that a governing body may not conduct an executive session during a meeting and a meeting may not be recessed and reconvened with the intent of circumventing this subsection.

As noted before, this argument is moot because the executive session was not properly noticed or justified. However, for future reference, this subsection would likely not apply under these circumstances. The purpose of the prohibition is to ban going in-and-out of a public meeting in real time to discuss the subject matter of the public meeting behind closed doors and then re-opening the meeting. Those situations are generally done contiguously and all in one evening.

There is no prohibition on reconvening a budget meeting for a series of evenings through the process and holding an executive session between those reconvened meetings on an entirely separate subject matter would not run contrary to the intent of the law. It is not specifically attempting to circumvent the statute and I do not believe the Council intended to circumvent the law at all. I just believe there is a

misunderstanding as to how the Open Door Law applies to them.

CONCLUSION

Based upon the foregoing, it is the Opinion of the Public Access Counselor that the Newton County Council inappropriately held an executive session without notice to discuss alleged misconduct of an employee that was not under its jurisdiction.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor